

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT DELAWARE**

KEURIG, INCORPORATED,

Plaintiff,

V.

KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants.

C.A. No. 07-17 (GMS)

JURY TRIAL DEMANDED

PUBLIC VERSION

**DEFENDANTS' MOTION IN LIMINE TO LIMIT EXPERT
TESTIMONY OF DR. ALEXANDER SLOCUM**

OF COUNSEL

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Dated: August 4, 2008
Public Version Dated: August 11, 2008
877077 / 31118

*Attorneys for Defendants
Kraft Foods Global, Inc., Tassimo
Corporation, and Kraft Foods Inc.*

Defendants Kraft Foods Global, Inc., Tassimo Corporation, and Kraft Foods, Inc. (collectively "Kraft"), by counsel, states the following in support of its Motion *in Limine* to limit the Expert Testimony of Dr. Alexander Slocum, serving as a technical expert for Plaintiff Keurig, Incorporated ("Keurig").¹ In particular, Kraft respectfully moves to preclude any testimony: (1) based upon or relying upon the inadmissible opinions of Ted Lingle related to his specialized definition of claim term "beverage" in the asserted claims of U.S. Patent No. 6,707,762 ("the '762 Patent") as well as Mr. Lingle's inadmissible opinion applying his claim construction of the term "beverage" to the prior art; and (2) regarding the relative aspect ratios of beverage filter cartridges.

ARGUMENT

I. Dr. Slocum Cannot Rely Upon the Inadmissible Opinions of Ted Lingle

[REDACTED]

[REDACTED] In his Rebuttal report and at his deposition, Dr. Slocum relies upon the opinions of Ted Lingle regarding the definition of the claim term beverage.

In his Rebuttal report, Dr. Slocum states [REDACTED]

[REDACTED]

[REDACTED] But this statement was based on Mr. Lingle's inadmissible opinion he did [REDACTED]

[REDACTED]

[REDACTED] In his deposition, Dr. Slocum acknowledges that:

Well, my understanding for the term beverage -- because I'm not an expert in that area, I relied -- the Court itself didn't give me an exact definition of what beverage is. I have to refer back explicitly

¹ Pursuant to D. Del. LR 7.1.1, the parties met and conferred, and Plaintiff will oppose the motion.

to that document, but in that respect, I relied on Mr. Lingle, who is an acknowledged expert in the field of coffee beverages.

Slocum Dep. Tr. (Ex. 3) at 8. Accordingly, Dr. Slocum reveals Keurig's gambit of using expert testimony to usurp the Court's role in claim construction in view of Kraft's prior art, which clearly anticipates the '762 Patent under the Court's *Markman* Order. As discussed in a companion motion *in limine*, Mr. Lingle should be precluded from testifying at trial. Accordingly, Dr. Slocum should be barred from testifying at trial with regard to Mr. Lingle's opinion or from relying upon Mr. Lingle's opinion.

II. Dr. Slocum Failed to Identify His Aspect Ratio Theory in Both His Expert and Rebuttal Reports

Kraft is relying upon the Singles cartridge as anticipatory prior art. In all material respects the Singles cartridge is virtually identical to the only disclosed embodiment in the provisional application from which the '762 Patent claims priority and to the first disclosed embodiment in the '762 Patent.

In this litigation, Keurig has maintained that the lid of the Singles cartridge is not pierceable to accommodate an inflow of liquid. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But neither does the disclosure of the '762 Patent. The specification of the '762 Patent states:

The lid material has a lesser resistance to being yieldably pierced as compared to the resistance of the container bottom, and is thus less prone to inward distortion with accompanying buckling of the container sidewall. The net result is a cleaner puncture and in improved seal around the outlet probe.

'762 Patent, Col. 2, Lines 14-20. The figures for the two disclosed embodiments do not disclose a support structure against which to press a gasket or other device to form a seal.

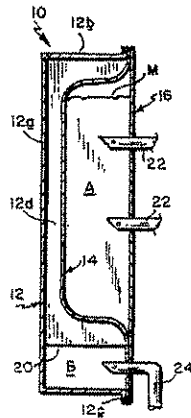


FIG. 5

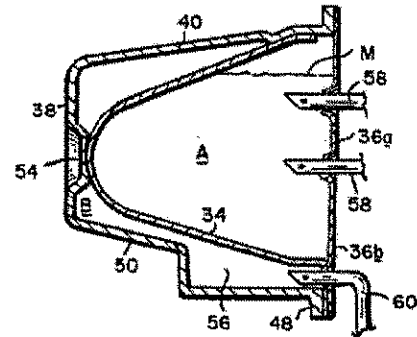


FIG. 13

Thus, Dr. Slocum's opinion as to why Kraft's asserted prior art is not suitable for same-side piercing, if correct, would also apply to the '762 Patent, thereby rendering the asserted claims invalid for lack of enablement. Realizing the dilemma his opinion placed Keurig in, at his deposition, Dr. Slocum on the spot abandoned his argument regarding the need for a support structure and invented a new theory why Kraft's prior art would not invalidate the '762 Patent's claims. He raised his new "aspect ratio" theory.

He proceeded to opine that the '234 Patent and Singles cartridge, as well as the first embodiment of the '762 Patent, are not suitable for same side piercing because the cartridges have a flat aspect ratio. Slocum Dep. Tr. (Ex. 3) 27-28, 31-32. Dr. Slocum then asserted that a cartridge must have a one-to-one aspect ratio, like the embodiment shown in Figs. 7-9 of the '762 Patent, to directly inject fluid into the coffee bed for same side piercing. *Id.* at 27. But nowhere in his Expert or Rebuttal report does Dr. Slocum assert that Kraft's prior art fails to anticipate the '762 Patent due to its aspect ratio, nor does he discuss that for the same reason the first embodiment of the '762 Patent is inoperative. Plain and simple, Kraft was ambushed by Dr. Slocum at his deposition.

Rule 26 requires that expert reports “must contain: a *complete* statement of *all* opinions the witness will express and the basis and reasons for them.” Fed. R. Civ. P. 26(a)(2)(B) (emphases added). Keurig’s violation requires the exclusion of these previously undisclosed opinions. Rule 37, which requires the exclusion of all opinions not disclosed as required by Rule 26, states:

If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1); *see also Inline Connection Corp. v. AOL Time Warner, Inc.*, 472 F. Supp. 2d 604, 612 (D. Del. 2007); *Johnson v. Vanguard Mfg., Inc.*, 34 Fed. Appx. 858, 859 (3d. Cir. 2002) (Trial court did not abuse its discretion by excluding expert opinion testimony not included in report). Accordingly, Dr. Slocum should not be permitted to testify at trial regarding the previously undisclosed aspect ratio theory.

Dr. Slocum’s raised the issue of “aspect ratio” on his own accord. Neither Kraft nor its technical expert, Malcolm Taylor, discussed the aspect ratio of beverage cartridges. To the contrary, Dr. Slocum simply sprung his revised opinion upon Kraft when questioned as to why he believed Kraft’s prior art did not anticipate the asserted claims of the ‘762 Patent. Thus, Dr. Slocum was not prompted by Kraft when presenting his new opinions with regard to invalidity.

Moreover, Dr. Slocum’s “aspect ratio” theory completely contradicts the originally filed disclosure of the ‘762 Patent, which shows only the first embodiment of the ‘762 that looks just like the Singles cartridge. *See* U.S. Provisional Patent Application No. 60/183,569 (Ex. 4), Figs. 1-4. Dr. Slocum testified that the first embodiment of the ‘762 Patent showing a flat aspect ratio cartridge would not produce a beverage. Slocum Dep. Tr. (Ex. 3) at 31-32. He then opines that the cartridge illustrated in Figures 6-8 of the ‘762 patent is the “actual useful embodiment”

because its “aspect ratio is more kind of one-to-one.” *Id.* at 27. But the “useful embodiment” was not disclosed until the filing date of the nonprovisional application -- February 13, 2001. Thus, allowing Dr. Slocum to present such new opinion testimony prejudices Kraft as it permits Keurig to present evidence narrowing the ‘762 Patent’s scope to avoid Kraft’s prior art, without giving Kraft an opportunity to present legal defenses related to the loss of priority.

CONCLUSION

For the foregoing reasons, Kraft respectfully requests that the Court grant this Motion *in Limine* to limit Dr. Slocum’s testimony at trial.

Respectfully submitted,

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Corporation, and Kraft Foods Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on August 11, 2008, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on August 11, 2008, the attached document was Electronically Mailed to the following person(s):

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EXHIBIT 1

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 2

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 3

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3 ----- x
4 KEURIG, INCORPORATED,

5 Plaintiff,

6 v.

7 KRAFT FOODS GLOBAL, INC., TASSIMO CORPORATION, and
8 KRAFT FOODS INC.,

9 Defendants.
10

11 Civil Action No. 07-CV-0017-GMS
12 ----- x

13 VIDEOTAPED DEPOSITION OF ALEXANDER H. SLOCUM

14 Wednesday, June 11, 2008

15 9:10 a.m. to 5:00 p.m.

16 WOLF, GREENFIELD & SACKS, P.C.

17 600 Atlantic Avenue

18 Boston, Massachusetts

19 Reporter: Marianne R. Wharram, CSR/RPR
20

21
22
23 ELLEN GRAUER COURT REPORTING CO. LLC

24 126 East 56th Street, Fifth Floor

25 New York, New York 10022

212-750-6434

REF: 87765

1 SLOCUM

2 construction, or claim construction, what different
3 terms mean. That's what I have to ultimately abide
4 by is what is the Court's claim construction.

5 Q. In your expert report, you opine about the
6 meaning of the word beverage; is that correct?

7 MR. RADER: Objection to the form. You
8 can answer.

9 A. Well, my understanding for the term
10 beverage -- because I'm not an expert in that area,
11 I relied -- the Court itself didn't give me an
12 exact definition of what beverage is. I have to
13 refer back explicitly to that document, but in that
14 respect, I relied on Mr. Lingle, who is an
15 acknowledged expert in the field of coffee
16 beverages. And then, when I actually ran the
17 various tests in various scenarios, I also, because
18 I'm a fairly avid coffee drinker, would then taste
19 the stuff made by the various ways I did.

20 Q. (BY MR. SCHLITZ) But when you read the
21 patent, what was your understanding? Before --
22 when did you speak to Mr. Lingle?

23 A. I first met Mr. Lingle a couple of months
24 ago when I did my extensive tests with the hot
25 water to actually attempt to create the beverage.

1 SLOCUM

2 referring to aspect ratio, the length and the width
3 of a coffee bed and what's those -- what are those
4 proportions with respect to the depth between where
5 you're putting in the fluid and where it wants to
6 exit.

7 Q. All right.

8 A. Now, all these flat cartridges, I would
9 say, have a flat aspect ratio. The depth is
10 shallow.

11 Q. When you say these, you were pointing to
12 something.

13 A. I'm sorry. The Singles cartridges or the
14 cartridge from the '234 patent.

15 Q. Okay.

16 A. So when you go -- or the embodiment of
17 Figure -- nominally, Figure 4.

18 Q. Right.

19 A. Now, compare those proportions to what I
20 think is the actual useful embodiment of Figures 6,
21 7 and 8 of the '762 patent, which is that aspect
22 ratio is more kind of one-to-one, the depth with
23 here, and in the actual, these flat type
24 cartridges, it's like three or four-to-one is the
25 characteristic aspect ratio. The problem with just

1 SLOCUM

2 taking something of this aspect ratio and piercing,
3 in the language of the patent, and then injecting
4 your fluid is that the water, which comes in at a
5 reasonable pressure, shoots right through the
6 coffee, or whatever your drink is, into the filter
7 and then rushes out your filter, so you don't get
8 good wetting -- that's wetting, excuse me -- of the
9 bed of -- and you end up putting through the
10 required amount of fluid to fill your cup, but it
11 really only acts on a small region of coffee, which
12 is why I think it comes out so -- so weak and why I
13 said yeck, it doesn't really taste like coffee.
14 When you have a -- and that's why I believe the
15 '234 and the Singles, they both have this
16 manifolding system --

17 Q. All right.

18 A. -- to evenly wet. And I opened up
19 cartridges from the Singles machine after they were
20 used and I looked at the bed and I opened up the
21 cartridges after I would do my test and I looked at
22 the bed, and the tests I ran, you would always
23 burrow a hole. And I can discuss more in terms of
24 scientific principles of aspect ratios if you want.

25 Q. Please do.

1 SLOCUM

2 you correct -- and please correct me if I'm
3 wrong -- are you of the opinion that because of the
4 aspect ratio of the first embodiment, it wouldn't
5 work? Are we talking about the patent-in-suit?

6 A. Okay, so if I'm looking at this guy, I
7 don't think that's a very -- now, they show two
8 nozzles here, but I still think you're going to get
9 burrowing between the two, and I don't think this
10 is a very useful embodiment, personally.

11 Q. You said not useful. I mean, would it
12 work?

13 A. Well, I didn't construct this. I just used
14 the Singles cartridge --

15 Q. Right.

16 A. -- and I did the Rychiger one, which is
17 back. I'm sure I got some -- actually, I know I
18 got some flow into the manifold, but nominally,
19 like you said, if we ignore the manifold, which I'm
20 able to do by keeping it blocked, I never got what
21 I would call or Mr. Lingle called a good beverage,
22 so with that as a model of three, four, five, I --
23 I don't think this is a very good embodiment.

24 Q. Now -- well, you say it's not very good.
25 Would it produce a beverage, in your opinion?

1 SLOCUM

2 A. Based on my model, I don't think three,
3 four, five makes a beverage.

4 Q. Now, when you were talking about the aspect
5 ratio, and with regard to Figure 13, okay --

6 A. Correct.

7 Q. -- you say because -- in Figure 13, are you
8 aware that the -- well, in what orientation would
9 you have to use Figure 13?

10 A. Um, I actually think it would -- it would
11 work -- this vertical orientation -- it would work
12 vertical orientation where, for example -- and it
13 would work in several.

14 Q. Okay.

15 A. It would work vertical orientation where
16 the gravity vector points -- I'm trying to figure
17 out how I'm going to do this with the video thing,
18 but where the area of the gravity vector would be
19 located on the lid.

20 Q. Would the foil be down or up or sideways?

21 A. That's a better way of putting it. The
22 foil would be -- down would work. I believe it
23 would work with the foil vertical.

24 Q. Right.

25 A. With the foil horizontal, or up, excuse me,

EXHIBIT 4

~~Case 1:07-cv-00017-GMS Document 47-2 Filed 11/05/2007 Page 37 of 55~~5446
N-Cup

This invention relates generally to beverage filter cartridges of the type described in U.S. Patent No. 5,840,189, the disclosure of which is herein incorporated by reference.

A preferred embodiment of the invention is disclosed in the accompanying drawings,
5 wherein:

Figure 1 is a top plan view of the beverage filter cartridge;

Figure 2 is a longitudinal sectional view taken along line 2-2 of Figure 1;

Figure 3 is an exploded perspective view of the filter cartridge components; and

Figure 4 is a view similar to Figure 2 showing the beverage filter cartridge in use during a
10 brewing cycle.

Referring now to the drawings, a beverage filter cartridge in accordance with the present invention is generally depicted at 10. The cartridge includes an outer container 12, a filter
15 element 14 and a lid 16.

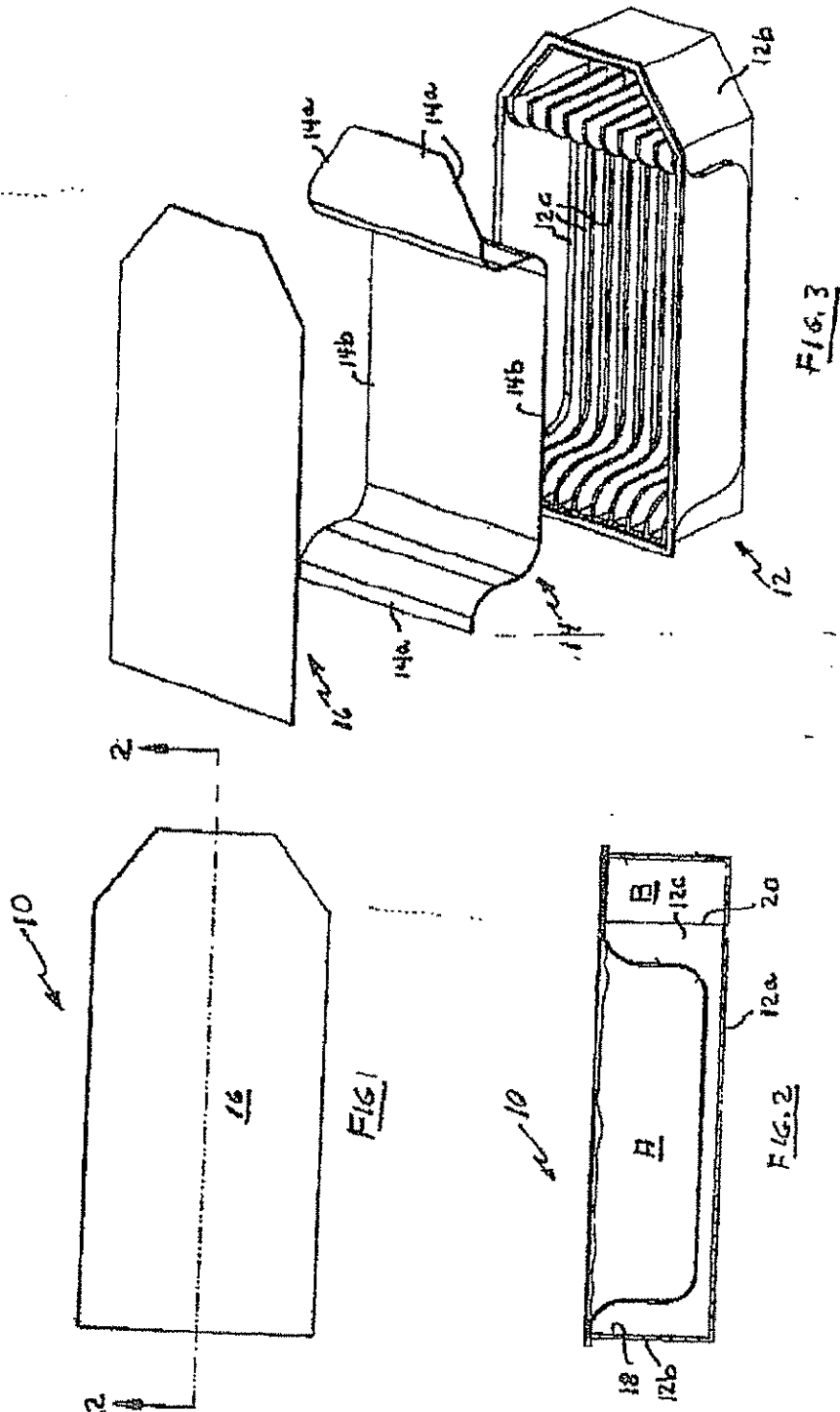
The outer container 12 is generally tray-shaped, with a bottom wall 12a, a side wall 12b, and a series of laterally spaced support ribs 12c projecting upwardly from the bottom wall and extending in parallel relationship in the lengthwise direction of the container.

As can be best seen in Figure 2, the ribs 12c join the side wall 12 as at 18, and curve downwardly and then extend in parallel relationship to the bottom wall before again curving
20 upwardly to terminate as at 20, thereby forming an open exit chamber B.

The filter element 14 is formed from sheet material shaped to conform to the shape of the upper edges of the support ribs. The filter element is received in the container 12, with the edges 14a of its ends overlapping and sealed to the upper edge of the container side wall 12b, and with the edges 14b of its sides overlapping and sealed to outermost ribs 12c which project integrally

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